SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 120.

GIOVANNI LAVAGNINO, PLAINTIFF IN ERROR,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN, AND THE ST. JOE MINING COMPANY.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

STATEMENT.

The ground of this motion is that, whilst a right under Federal statute was distinctly raised in the courts below by plaintiff in error and was as distinctly denied, the decision of the supreme court of Utah was rested upon another ground not involving a Federal question sufficiently broad to support the judgment, and hence under the well-settled rule in this court the pending writ should be dismissed. The rule is too well settled to require discussion. Our contention is that the facts of present record demonstrate that it does not here apply.

This is an "adverse claim" suit brought by plaintiff in error under the United States mining laws, claiming priority of right to the *res* involved:

(1.) By purchase from the locator of the "Yes You Do" Lode mining claim, and

(2.) That such location was made on the abandonment of the "Levi P." and "Veta" Lode mining claims, covering the same premises, and hence forming continous and paramount record claim and right of possession against the defendants in error since January 1, 1889.

The location of the "Yes You Do" claim was made January 1, 1898, under the United States mining laws and as a "relocation of the Levi P. claim" (R., 135, 136) by J. Fewson Smith, Jr., and conveyed by the locator to the plaintiff in error on September 5, 1898 (R., 136, 137). At the trial the plaintiff first offered in evidence both the location certificate and deed. The defendants objected upon the ground that the locator (Smith) was at the time of the location a deputy mineral surveyor and was thereby prohibited under section 452, U. S. Rev. Stats., from making such location; that such location was invalid, and the attempted conveyance thereof to plaintiff likewise invalid. The court sustained the objection upon the distinct understanding, expressed upon the record, that it was thereby ruling a Federal question, inasmuch as the plaintiff claimed right to the premises under section 2319, U. S. Rev. Stats., and his right thereto was denied under the court's construction of section 452 thereof (R., 73, 74).

Before the supreme court of Utah this question stood at the front for discussion and decision, as will be found by examination of its opinion (R., 140–149).

After the trial court had thus excluded all evidence relating to the "Yes You Do" claim and the conveyance thereof to the plaintiff, counsel offered to prove (R., 75), *inter alia*, the location of the "Levi P." and "Veta" claims antecedent to the locations under which the defendants rely; the per-

formance of annual labor upon the "Levi P." and "Veta" claims, and their abandonment, as well as failure to perform annual labor thereon for the year 1897, resulting in the location of the "Yes You Do" claim January 1, 1898. To this offer the defendants objected.

Pending the court's final ruling thereon the defendants were permitted to make proof of their claim of right to the premises in dispute under the locations known as "Uhlig No. 1" and "Uhlig No. 2," as made January 1, 1889.

Thereupon the plaintiff offered in evidence the location notice of the "Levi P.," to which the defendants objected, and the trial court sustained the objection upon the ground that no proof whatever could be offered in respect of the "Levi P." claim, because the owner or claimant thereof had not, during the period of publication of application for patent by the defendants on the "Uhlig No. 1" and "Uhlig No. 2" claims, filed adverse claim under section 2326, U. S. Rev. Stats.; that hence neither plaintiff nor any one else could prove as a *fact* that the premises in dispute were covered by the "Levi P." claim or possession or right of possession thereunder (R., 130, 131).

To this ruling exception was taken. The supreme court of Utah affirmed the ruling of the trial court and for the same reason (Op. R., 145–147), holding that this plaintiff had no legal right to show the status of the premises as covered by an existing valid location, to wit, the "Levi P.," down to January 1, 1898, when the location of the "Yes You Do" claim was made.

Having thus excluded *all evidence* offered by the plaintiff, there was nothing left by way of proof except that adduced by the defendants.

Upon such *ex parte* showing the trial court found the facts as relating solely to the "Uhlig No. 1" and "Uhlig No. 2" and gave judgment for the defendants accordingly. Treating these rulings and findings as conclusive of all questions of *fact* in the case, the supreme court of Utah proceeded to

apply the local statute of limitations in favor of the defendants, and without the suggestion of any plea by defendants of the statute of limitations *anywhere* in the record, by holding in effect that as by such findings the defendants had been in possession for over seven years (the Utah statute of limitations) prior to the location on January 1, 1898, of the "Yes You Do" claim, their right was superior on that ground. In thus applying the local statute of limitations the supreme court of Utah invoked section 2332, U. S. Rev. Stats., which provides that (R., 148):

> "Where such person or association, they and their "grantors, have held and worked their claims for a "period equal to the time prescribed by the statute "of limitations for mining claims of the State and "Territory where the same may be situated, evidence "of such possession and working of the claims for "such period shall be sufficient to establish a right to "a patent thereto under this chapter, in the absence "of any adverse claim; but nothing in this chapter "shall be deemed to impair any lien which may have "attached in any way whatever to any mining claim "or property attached prior to the issuance of a "patent."

The court reaches this conclusion by assuming the possession of the entire premises by the defendants under the "Uhlig No. 1 and No. 2" locations for a period of seven years, during which time the locator and claimant of the "Levi P." and "Veta" claims brought no action to recover the possession, as well as by his failure to file adverse claim against the application for patent on the Uhlig Nos. 1 and 2.

After thus applying the statute of limitations without, as stated, its being anywhere in the record plead by the defendants, the opinion concludes:

> "In view of these facts the plaintiff, even if J. Few-"son Smith, Jr., had not been a deputy United States "mineral surveyor—as the location of the 'Yes You "Do' was not made until eight years after the said

"possession of the Uhlig Nos. 1 and 2 was begun—
"could not avail himself of any rights which the said
"Mayberry may have had."

This is the ground on which the pending motion to dismiss is based. It is insisted that the court in thus ruling put its decision upon ground sufficiently broad to sustain the judgment, and which did not involve any Federal question. We submit that the error of this conclusion is manifest.

ARGUMENT.

I.

It was of the very essence of the plaintiff's case to show that the premises in question had been covered by an existing location and possession, to wit, the "Levi P." and "Veta" claims, since January 1, 1889, but the evidence offered in the trial court to establish this fact was wholly excluded. The legal effect of such evidence, if admitted, would have been to demonstrate that the right of possession was not in the defendants, but in the locator of the "Levi P." and "Veta" claims—a right distinctly recognized and protected by section 2332, U. S. Rev. Stats., *supra*. Manifestly, then, this was a right set up under Federal law, and by the rejection of the proffered evidence it was a right distinctly denied in the trial court, and such denial affirmed in the State supreme court.

II.

Even could the supreme court of Utah voluntarily apply the local statute of limitations, it is manifest that section 2332, U. S. Rev. Stats., in recognizing the application of the local statute of limitations, must be construed *in pari materia* therewith. That section notes an express exception to the

application of the local statute of limitations, to wit, "*the absence of any adverse claim.*"

It was contended in the trial court and in the supreme court of Utah, on behalf of this plaintiff, that the "Levi P." was such an adverse claim. The evidence to prove that contention was, however, excluded and the court below then proceeded to apply solely the local statute of limitations, having first ruled that the location of the "Levi P." could not be considered because Mayberry, the locator and owner thereof, had not filed an adverse claim, and thereby overruling the express exception of section 2332, U. S. Rev. Stats., *supra.*

The location of the "Yes You Do" claim was made in terms as a relocation of the "Levi P." claim. It was made (1) upon the abandonment of the "Levi P." claim, and (2) upon forfeiture of that claim through failure of the claimant thereof to perform the annual assessment work for the year 1897. As against even the plea of the statute of limitations under section 2332, U. S. Rev. Stats., the claimant of the relocated "Levi P.," to wit, the "Yes You Do" claim, clearly had the right to show the former location and possession had by the former claimant thereunder. Such right of relocation on abandonment or forfeiture is expressly conferred by section 2324 of the U. S. Rev. Stats. It was expressly claimed by the locator of the "Yes You Do" claim. When the court below refused the right of the plaintiff in error to introduce evidence as to the existence of such former and abandoned location and the possession of the former claimant thereunder, it expressly denied a right set up under section 2324, U. S. Rev. Stats. The proof so offered was intended to show that the defendants in error had *not* been in continuous adverse possession for the period of limitation prescribed by the Utah statute of limitations. Manifestly the *exclusion* of such evidence was the *only* possible way in which the defendants in error could *ex parte* prove their possession and the only way by which the court on such

unilateral proof could have held *mero motu* that the statute of limitations did so apply.

We submit the Federal character of the question ruled is manifest. The court could not exclude the proffered evidence and its conclusion be then urged as involving only the State statute of limitations and hence beyond the power of review in this court. Such contention, carried to its logical result, would destroy all rights of the locator of an abandoned or forfeited claim under section 2324, U. S. Rev. Stats.—a result plainly against any sound construction of that section and leading to rank injustice.

Again, section 2332, U. S. Rev. Stats., applies the local statute of limitations only "in the absence of any adverse claim." But in the case at bar there *is* an adverse claim. One of its plain and essential elements is that it is based upon the relocation of another claim, which had been in existence since January 1, 1889. That right of relocation is expressly conferred by Federal law. (See sec. 2324, U. S. Rev. Stats.) The proffered and *rejected* proof was intended to show the existence of such former claim and the claimant's continuous possession thereunder. Such proof if admitted would have challenged the defendants in error's claim of possession for the period covered by the State statute of limitations. The mining laws cannot be construed to mean that because the claimant of the original and abandoned claim did not *after* such abandonment and relocation file his adverse claim to the application of the defendants in error—made after such abandonment and relocation—the present adverse claimant, whose claim was based upon the relocation of the former claim, cannot be heard to show in this action the *facts* as to such former and abandoned claim as rebutting the defendants' claim of possession for the period of limitation. That result would destroy the rights of the relocator and make the mining statute a snare and a reproach.

In *Beck vs. Meagher*, 104 U. S., 279, cited in the opinion

below, this court in applying section 2332, U. S. Rev. Stats. said (p. 287):

> "If he actually held possession and worked the "claim long enough *and kept all others out*, his right "to a patent would be complete."

But here we offered to show (1) the original location of the "Levi P.;" (2) possession thereunder, which would disprove that defendants had "*kept all others out*," and (3) upon abandonment and forfeiture of such original location our *relocation* of the premises was authorized by section 2324, U. S. Rev. Stats.

Clearly, in rejecting such evidence and in its absence then applying the State statute of limitations, the court below distinctly denied the right of the plaintiff in error, plainly asserted under section 2324, U. S. Rev. Stats., and as clearly *that* ruling involves a Federal question reviewable here.

Respectfully submitted.

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